2008

South Ridge Homeowners Association v. Lisa M. Brown : Brief of Appellee

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

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SOUTH RIDGE HOMEOWNERS' ASSOCIATION, a Utah Non-Profit Corporation, Plaintiff-Appellee, v. LISA M. BROWN, Defendant-Appellant.	:	**BRIEF OF APPELLEE SOUTH RIDGE HOMEOWNERS' ASSOCIATION** Appellate Case No. 20080836-CA

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Appeal from the Third Judicial District Court, Summit County, State of Utah
Honorable Robert K. Hilder, Case No. 070500211

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Rules

Other Authorities

STATEMENT OF JURISDICTION

Plaintiff-Appellee South Ridge Homeowners' Association ("South Ridge" or the "Association") agrees with the statement of jurisdiction contained in the brief of Defendant-Appellant Lisa M. Brown ("Ms. Brown" or "Appellant").

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. Issue: Whether the trial court, in granting South Ridge's Motion for Summary Judgment on its claim for breach of contract, correctly ruled that Article X, Section 2(a) of the Declaration of Covenants, Conditions and Restrictions for South Ridge Subdivision (the "CC&Rs") is unambiguous as a matter of law and whether the trial court correctly interpreted Article X, Section 2(a) of the CC&Rs as prohibiting Ms. Brown from using her South Ridge subdivision home for business purposes and renting it for periods of less than thirty days.

Standard of Review and Preservation: South Ridge agrees with the standard of review set forth by Ms. Brown and that the issue was preserved below.

2. Issue: Whether the trial court correctly granted injunctive relief to South Ridge and against Ms. Brown where it found that Ms. Brown violated the CC&Rs by renting her subdivision home for periods as short as one week.

Standard of Review and Preservation: South Ridge agrees with the standard of review set forth by Ms. Brown but notes for clarification that appellate courts, when reviewing the grant of an injunction, "'are generally careful not to disturb the ruling unless the [trial] court abused its discretion,'" *Dairy Prod. Servs. v. City of Wellsville*,

2000 UT 81, ¶ 16, 13 P.3d 581 (quoting *Aguagen Int'l Inc. v. Calrae Trust*, 972 P.2d 411, 412 (Utah 1998)). As Ms. Brown stated, the Court of Appeals makes that determination "using sound equitable principles based on all the facts and circumstances." *Id.*, 13 P.3d 581. South Ridge agrees that this issue was preserved below.

3. Issue: Whether the trial court correctly awarded attorney fees and costs to South Ridge as the prevailing party on all claims.

Standard of Review and Preservation: South Ridge agrees with the standard of review set forth by Ms. Brown and that the issue was preserved below.

STATEMENT OF THE CASE

I. Nature of the Case

This case involves the enforcement of a restrictive covenant against a homeowner who believes that she is not subject to rules imposed by either the CC&Rs or the court. The South Ridge subdivision is subject to CC&Rs which prohibit "timeshare[s], nightly rental[s] or similar use[s]." The objective of the CC&Rs is to create a quiet neighborhood with single family residences. The CC&Rs prohibit business uses of property in the neighborhood. Ms. Brown lives in California and was using her subdivision home as a business property, renting it to vacationers for short periods of time. According to Ms. Brown, she rented the home for periods as short as one week. South Ridge twice asked Ms. Brown to stop her rentals in an effort to avoid litigation.

Rather than stop her violations and try to find a solution with South Ridge, Ms. Brown ignored communications from the Association, forcing it to seek relief in the trial

court. In response, Ms. Brown adopted an unreasonable and untenable interpretation of the CC&Rs. She claims that the CC&Rs prohibit rentals of one night only and allow any rentals of two or more nights, thus excusing her conduct. Yet she knew that she was violating the CC&Rs. She provided her customers with a list of rules for the use of her home, including a rule that they not divulge their status as renters, lest her violations be discovered.

The question before the trial court, and now this Court, was whether the CC&Rs prohibit Ms. Brown's short term rentals. The trial court appropriately found that they do and, based on the undisputed facts before it, held that Ms. Brown had violated the CC&Rs. The trial court entered an order enjoining Ms. Brown from renting her South Ridge home for periods of less than thirty days. The trial court also held that Ms. Brown had the right to allow friends or family to visit and stay at the home. To ensure that South Ridge could protect its interest in enforcing the CC&Rs, the trial court fashioned a remedy requiring Ms. Brown to provide advance written notice of their visits so South Ridge could distinguish her guests from her customers.

Ms. Brown disagreed with the trial court's order, and while she filed this appeal, she also determined that she did not need to comply with the order, allowing numerous couples to stay at her subdivision home without notice to South Ridge. She continued this conduct even after receiving notice from South Ridge that she was in violation of the order. The pattern of her conduct throughout this case has been to ignore the rules and attempt to excuse her misconduct after the fact.

II. Course of Proceedings and Disposition Below

South Ridge filed its Complaint on April 23, 2007, alleging that Ms. Brown violated the CC&Rs and sought injunctive relief and an award of attorney fees. (R. at 1.) South Ridge served Ms. Brown at her home in California. (R. at 8.) Ms. Brown filed her Answer on May 26, 2007. (R. at 6.)

The parties participated in written discovery (initial disclosures, requests for admissions and interrogatories), (R. at 13-22, 42), though South Ridge was forced to file a Motion to Compel to obtain responses from Ms. Brown to its discovery requests, (R. at 23, 35).

On January 18, 2008, South Ridge filed its Motion for Summary Judgment. (R. at 43.) Ms. Brown filed an opposition memorandum on February 11. (R. at 55.) Ms. Brown did not request an extension to conduct further discovery nor did she file a motion under Rule 56(f) of the Utah Rules of Civil Procedure in response to South Ridge's Motion for Summary Judgment. South Ridge filed its reply memorandum, (R. at 67), and the trial court heard oral arguments on May 9, 2008, (R. at 78). At the hearing, the trial court granted South Ridge's Motion for Summary Judgment, finding that the CC&Rs were unambiguous and that the undisputed facts demonstrated that Ms. Brown violated the CC&Rs. (R. 124 at 49-51.) The trial court also held that South Ridge was entitled to injunctive relief and its attorney fees in accordance with the CC&Rs. (R. 124 at 51-52.)

The trial court asked the parties to work together to come up with an acceptable order. (R. 124 at 51-52.) The parties exchanged drafts but were unable to reach

agreement on the form of the order. Each party submitted a proposed order, and South Ridge submitted an affidavit of attorney fees, which Ms. Brown moved to tax. (R. at 108-111.) The trial court issued a Ruling and Order on September 8, 2009, holding that Ms. Brown's arguments regarding the form of the order were not well taken. (R. at 110.) The trial court executed the Order and Judgment proposed by South Ridge on August 25, 2008, but struck out by hand language that Ms. Brown's threatened to continue violating the CC&Rs. (R. at 113-115.) The trial court struck that language "[b]ased on [Ms. Brown's] statement in her objection [to the form of South Ridge's order] that she has no such intention." (R. at 111.) The trial court held that South Ridge was, "nevertheless[,] entitled to the injunctive relief prayed for in its complaint." (R. at 111.) A Judgment in favor of South Ridge for attorney fees was entered by the trial court on September 22, 2008. This appeal followed.

Since entry of the Order and Judgment, members of the Association witnessed several different groups of vacationers staying at Ms. Brown's home. Having not received the notice from Ms. Brown required by the Order and Judgment, South Ridge filed a Motion for Contempt Order on February 5, 2009. (R. at 129.) South Ridge sought an order finding Ms. Brown in contempt and an award of attorney fees because she violated the Order and Judgment by renting her subdivision home and by failing to provide advance written notice of visits by her friends or family, forcing South Ridge to bring the matter to the trial court's attention--the precise situation the Order and Judgment was designed to avoid. (R. at 132-36.) Ms. Brown filed a memorandum in

opposition, claiming that those staying at her home were friends or family. (R. at 148-50.) The trial court held a telephone conference on April 21, 2009, and found that Ms. Brown had violated the Order and Judgment but indicated that it was not inclined to award fees to South Ridge unless Ms. Brown's violations continued. No written order has been entered by the trial court on the issue of Ms. Brown's contempt.

III. Statement of Facts

1. The South Ridge subdivision is located in Summit County and is comprised mainly of single-family homes.

2. The subdivision is subject to recorded Covenants, Conditions and Restrictions--the CC&Rs at issue in this case. (*See* R. at 46, Exhibit B.) A copy of the CC&Rs is attached as Exhibit E to Ms. Brown's Addendum.

3. Ms. Brown lives and works as an attorney in California but owns a home within the South Ridge subdivision which is subject to the CC&Rs. (*See id.* Exhibit C.)

4. The CC&Rs provide that their general objective "is to create and maintain a large residential district characterized by the following: single family homes, private parks, open spaces and/or playgrounds; well kept lawns, trees and other plantings; minimum vehicular traffic; and quiet residential conditions favorable to family living." (Exhibit E to App.'s Br. at 15, Art. X.)

5. The CC&Rs prohibit any occupation or use of the property within the subdivision "in any manner which is contrary to the planning and zoning ordinances and regulations applicable thereto." (*Id.* Art. X, § 1.)

6. The CC&Rs provide that "[n]o lot shall be used except for single family residential purposes." (*Id.* Art. X, § 2(a).)

7. In the same section, the CC&Rs provide that "[n]o timeshare, nightly rental or similar use will be allowed on any single family residential lot." (*Id.*)

8. Section 16 of Article X provides that "[t]he lands within the property shall be used exclusively for single family residential living purposes and shall never be occupied or used for any commercial or business purpose . . . with the . . . exception that any owner . . . may rent or lease said owner's residential building from time to time." (*Id.* at 18.)

9. South Ridge is authorized "to enforce . . . all restrictions, conditions, covenants, reservations, liens and charges now or hereafter imposed by the provisions of this Declaration." (*Id.* at 20, Art. XI, § 1.) "Costs of such enforcement, including reasonable attorney's fees, shall be borne by the party(ies) in violation." (*Id.*)

10. Sometime around July 2006, South Ridge learned that Ms. Brown was advertising and renting her subdivision home on a short term basis. (R. at 3 & 46, Exhibits E-F.)

11. South Ridge sent a letter to Ms. Brown reminding her of the short term rental prohibition in the CC&Rs and requesting assurances that she would cease the rentals. (R. at 3.) Ms. Brown spoke with a South Ridge board member and denied that she was violating the CC&Rs. (R. at 46, Exhibit C.)

12. In February 2007, several individuals who were renting Ms. Brown's subdivision home experienced a heating problem and sought assistance from neighbors in the subdivision. (R. at 3.) The renters disclosed certain "House Rules" Ms. Brown had imposed on renters governing the use of her subdivision home. (*Id.*) Ms. Brown's House Rules state that her subdivision neighbors

> are long-term, full-time residents. They may stop by looking for me. If they do, tell them that "Lisa's not here right now" and be polite. You may tell them that you are my guests, friends, etc., but do not disclose that you are renting the home, as that will make them unhappy, and they will try to make me unhappy.

(R. at 46, Exhibit H.) Another version of the House Rules that was revealed by the renters similarly provides that the subdivision neighbors

> are long-term, full-time residents. Sherrie and Tom are the neighbors across the street, and it would not be unusual for Sherrie to stop by "looking for Lisa." If anyone stops by, tell them that "Lisa's not here right now" and be polite. Tell them only that you are my guests or friends.

(*Id.*) This second version also provides that "[z]oning ordinances prohibit parking on the street," and admonishes renters not to exceed the four vehicles allowed in the garage and driveway. (*Id.*) A copy of Ms. Brown's "House Rules" is attached to the Addendum as Exhibit A.

13. On March 19, 2007, South Ridge sent a second letter to Ms. Brown requesting that she stop her short term rentals. (R. at 4.) Ms. Brown did not respond to the Association's request. (*Id.*)

14. South Ridge filed suit on April 19, 2007, seeking to enjoin Ms. Brown's short term rentals and for an award of attorney fees incurred as a result of having to bring this action. (R. at 1-5.)

SUMMARY OF ARGUMENT

The trial court correctly determined that the CC&Rs are unambiguous and that the undisputed facts demonstrate that Ms. Brown violated their terms. The CC&Rs provide that no "timeshare, nightly rental or similar use will be allowed on any" lot. The CC&Rs also prohibit commercial uses of the lots within the South Ridge subdivision and limit their use to single family residences. Ms. Brown has adopted the untenable position that the CC&Rs prohibit rentals of one night and that any longer rental period is acceptable. Her interpretation incorrectly focuses on the term "nightly" to the exclusion of all other terms. Read as a whole, the CC&Rs demonstrate the intent to prohibit short term rentals to transient lodgers. The undisputed facts showed that Ms. Brown had rented her home for periods as short as one week. Ms. Brown knew she was violating the CC&Rs and asked her customers not to disclose that fact. The trial court correctly ruled that South Ridge was entitled to summary judgment and its decision should be affirmed.

Ms. Brown also challenges the trial court's issuance of an injunction prohibiting her from renting her South Ridge home and requiring that she provide advance notice of stays by her friends and family. The trial court properly issued the injunction because South Ridge is entitled to injunctive relief as a matter of course. The elements necessary to sustain the injunction were present regardless of the actual language used by the trial

court. In addition, Ms. Brown complains that the injunction's scope is overbroad. The injunction, however, properly balances the parties' rights. The trial court did not err in granting the injunction.

Finally, because the trial court's interpretation of the CC&Rs was correct and because the grant of injunctive relief was proper, the award of attorney fees to South Ridge was similarly justified. The CC&Rs expressly provide that South Ridge is entitled to an award of costs and attorney fees incurred in enforcing the CC&Rs. Should this Court affirm the trial court's determination, South Ridge is also entitled to an award of costs and fees incurred on appeal.

ARGUMENT

I. THE TRIAL COURT CORRECTLY INTERPRETED THE CC&RS

Ms. Brown attacks the trial court's interpretation of the CC&Rs on the basis that the CC&Rs prohibit only nightly rentals and she does not rent her South Ridge subdivision home for single nights. Her tack throughout this case has been, and on appeal continues to be, to focus only on the term "nightly," wholly ignoring the other prohibitions contained in the CC&Rs. The drafters of the CC&Rs sought to prohibit temporary and transient lodgers. Granting summary judgment to South Ridge was appropriate because the CC&Rs unambiguously prohibit Ms. Brown's short term rental of her subdivision home. Accordingly, the trial court's decision should be upheld.

A. The CC&Rs are Unambiguous

The trial court correctly determined that Article X, section 2 of the CC&Rs is unambiguous. That section reads in part: "No timeshare, nightly rental or similar use will be allowed on any single family residential lot." (Exhibit E to App.'s Br. at 15, Art. X, § 2.) Ms. Brown argues that this provision prohibits only nightly rentals. Her interpretation, however, is not supported by the CC&Rs. "Restrictive covenants are contracts that should be enforced consistently with the intention of the parties." *Swenson v. Erickson*, 2006 UT App 34, ¶ 10, 131 P.3d 267. Accordingly, covenant interpretation is governed by the same rules of construction used to interpret contracts. *Swenson v. Erickson*, 2000 UT 16, ¶ 11, 998 P.2d 807. The parties' intentions are ascertained from the document itself. *Id.*, 998 P.2d 807. "[U]nambiguous restrictive covenants should be enforced as written." *Id.*, 998 P.2d 807.

In this case, the CC&Rs manifest the drafters' intent to prohibit short term rentals of subdivision homes. Article X, section 2 prohibits all timeshares, nightly rentals, or similar uses. This language evinces an intent to prohibit short term, transient rentals that might disturb the residential character of the neighborhood or upset the "quiet residential conditions favorable to family living." (*See* Exhibit E to App.'s Br. at 15, Art. X.) The CC&Rs prohibit nightly rentals, weekly rentals, such as those typically used in timeshares, and all other similar, short term uses, including those engaged in by Ms. Brown.

"It is [a] court's duty to enforce the intentions of the parties as expressed in the plain language of the covenants." *Swenson*, 2000 UT 16, ¶ 11, 998 P.2d 807. Ms. Brown points to the dictionary definition of "nightly" to argue that her weekly rentals should be allowed. However, focusing solely on this definition is error. *See Freeman v. Gee*, 423 P.2d 155, 163 (Utah 1967) ("[S]uch language is to be taken in its ordinary and generally understood and popular sense, and is not to be subjected to technical refinement nor the words torn from their association and their separate meanings sought in a lexicon.").

Ms. Brown's proposed interpretation of the CC&Rs is untenable and unsupported by the language at issue. According to Ms. Brown, the drafters of the CC&Rs decided that allowing rentals of two nights would preserve the "quiet residential conditions favorable to family living" while a one-night rental would not. Ms. Brown claims that weekly rentals are acceptable, despite the prohibition on time-share arrangements and "similar uses," which are typically sold in one-week increments. The only prohibition, according to Ms. Brown, is on stays of one night, again, despite the prohibition of any "nightly rental" or "similar use." "The effect of accepting [Ms. Brown's] reading of the covenant would be to allow any [rental of two or more nights.] 'The drafters could not have intended such a result.'" *See Holladay Duplex Mgmt. Co. v. Howells*, 2002 UT App 125, ¶ 7, 47 P.3d 104 (quoting *Swenson v. Erickson*, 2000 UT 16, ¶ 16, 998 P.2d 807). *See also Cummings v. Nielson*, 129 P. 619, 621-22 (Utah 1912) ("Courts will always incline towards giving language a reasonable construction, and will avoid, if possible, an

absurdity if the language is susceptible of some other meaning."). Ms. Brown's distinction is not meaningful and renders the term "similar use" superfluous.

Moreover, contrary to Ms. Brown's argument, the grouping or location of the provisions is telling. The CC&Rs authorize a homeowner to "rent or lease said owner's residential building from time to time." (Exhibit E to App.'s Br. at 18, Art. X, § 16.) This section is separate from the prohibition on "timeshare[s], nightly rental[s] or similar use[s]." (*Id.* at 15, Art. X, § 2.) The CC&Rs authorize certain rentals along with leases, which are typically long term and provide the tenant an interest in the estate. *See Keller v. Southwood N. Med. Pavilion, Inc.*, 959 P.2d 102, 107 (Utah 1998).

Ms. Brown's *esjudem generis* argument, that "similar use" cannot be used to expand on the term "nightly," affords her no help. Ms. Brown's contention that the "nightly rental" restriction, contained in section 2 of the CC&Rs, is the only modifier to the authorization of "rent or lease" in section 16, and thus, the only restriction on renting is the nightly restriction, is wrong. The CC&Rs prohibit nightly rentals, timeshares and similar uses. That is, "similar use" does not expand on the term "nightly," rather, "similar use" is its own, distinct restriction that must be given effect. The general term "similar use" should be construed "based on the specific enumerations that surround that term." *See Café Rio, Inc. v. Larkin-Gifford-Overton, LLC*, 2009 UT 27, ¶ 25, 207 P.3d 1235. Giving effect to both provisions as the trial court did, reveals that the drafters intended to prohibit short term rentals (such as nightly rentals, weekly timeshares or

similar uses), while allowing rentals of longer periods (such as leases that grant an interest in the estate or similar uses).

The trial court correctly rejected Ms. Brown's argument and interpreted the CC&Rs as a whole, giving effect to every provision and ignoring none. *See id.*, 207 P.3d 1235. Although Ms. Brown recognizes this principle, (App.'s Br. at 17-18), her tribute is an empty one. As noted, accepting her argument ignores the term "similar use" and would effectively negate it. The trial court appropriately rejected Ms. Brown's proposed, but untenable, interpretation.[1] Therefore, the trial court's judgment should be affirmed.

B. The CC&Rs' Single Family and Residential Use Restrictions and Local Ordinances Support the Trial Court's Determination

The trial court also found support for its interpretation of the rental prohibition in the CC&Rs' requirement that the property be used for single family residential purposes only. The local ordinances that also govern the use of Ms. Brown's property, and to which the CC&Rs require adherence, similarly bolster the trial court's determination. They illustrate the objective of the CC&Rs to create a quiet neighborhood suitable to

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[1] None of the cases cited by Ms. Brown mandates that the rental provision be interpreted in her favor. In *St. Benedict's Development Co. v. St. Benedict's Hospital*, 811 P.2d 194 (Utah 1991), the plaintiff claimed that a lease and a construction contract between the parties gave rise to an implied restrictive covenant. In *Dansie v. Hi-Country Estates Homeowners Association*, 1999 UT 62, 987 P.2d 30, the property was not even subject to a set of the covenants, conditions and restrictions. And in *Swenson v. Erickson*, 2006 UT App 34, 131 P.3d 267, the question was whether homeowners had effectively terminated the covenants that burdened their properties. Here, there is no question that the CC&Rs are in effect and govern Ms. Brown's use of the property. Should the Court determine, however, that the CC&Rs are ambiguous on the rental issue, South Ridge agrees with Ms. Brown that the case should be remanded to the trial court for further consideration.

single family living and inform the proper construction of the prohibition on short term rentals.

Article X of the CC&Rs contains the following provision:

> The general objectives and intent of these covenant, restrictions and conditions is to create an maintain a large residential district characterized by the following: single family homes, private parks, open spaces and/or playgrounds; well kept lawns, trees and other plantings; minimum vehicular traffic; and quiet residential conditions favorable to family living.

(Exhibit E to App.'s Br. at 15, Art. X.) Article X likewise provides that "[n]o lot shall be used except for single family residential purposes." (*Id.*) Finally, "[t]he lands within the property shall be used exclusively for single family residential living purposes . . . ." (*Id.* at 18, Art. X, § 16.) The objective of the CC&Rs was to create a residential subdivision, precluding business or commercial uses. Ms. Brown, however, used her subdivision home as a business in violation of the CC&Rs. The trial court properly enjoined her violations.

Even the cases cited by Ms. Brown support this conclusion. In *Moore v. Stevens*, the court agreed that the defendant had violated the neighborhood's restrictive covenant that limited use of the property to "residence purposes," 106 So. 901, 902 (Fla. 1925), holding that "[t]here is no ambiguity in the quoted expression, nor doubt as to its meaning," *id.* at 904. The court stated that although "[t]he word 'residence' is one of multiple meanings, . . . the context in which it is used in this instance clearly indicates its meaning to be a dwelling house where a person lives in settled abode." *Id.* Accordingly,

the *Moore* court upheld the trial court's decision to permanently enjoin the defendant's use of the property for non-residential purposes.

Ms. Brown's remaining authority is unavailing. The courts in *Scott v. Walker*, 645 S.E.2d 278 (Va. 2007), and *Mullin v. Silvercreek Condominium Owner's Association*, 195 S.W.3d 484 (Mo. Ct. App. 2006), considered only whether certain use of property was prohibited solely by a covenant restricting uses to "residential purposes" or a covenant prohibiting "business purposes." There were no restrictions in the respective covenants on rentals. In addition, the facts are distinguishable. In *Mullin*, for example, the condominiums had been rented on a short term basis "[f]rom the beginning" and without objection. 195 S.W.3d at 490. The parties advocating in favor of short term rentals produced witnesses who testified that short term rentals were an accepted practice within the condominiums. *Id.* at 490-91. Minutes from the homeowner's association also indicated that short term rentals were acceptable. *Id.* at 491. Unlike these cases, the CC&Rs in question here contain limitations on short term rentals in addition to restricting use to residential purposes. Ms. Brown offered no evidence like that in *Mullin* to suggest that short term rentals are acceptable. South Ridge objected to her rentals immediately.

Similarly, *Yogman v. Parrott* is inapplicable because the court there considered only whether the defendant's use of the property was prohibited as a commercial use; "[n]one of the other provisions [in the covenants] relates to short-term rentals." 937 P.2d 1019, 1022 (Or. 1997). In this case, an express prohibition on short term rentals exists. That court recognized that its holding was limited to the specific language of the

covenant before it: "It may be that, in a case involving a differently-worded covenant, the facts shown here would be dispositive." *Id.* For example, in *Bruni v. Thacker*, the court held that a covenant limiting use to "single family residential purposes" prohibited the defendants' operation of a bed and breakfast in their home. 853 P.2d 307 (Or. Ct. App. 1993).

Courts in other jurisdictions have determined that a covenant restricting the use of property to residential uses prevents an owner from renting the property. *See, e.g.*, *Houck v. Rivers*, 450 S.E.2d 106, 109 (S.C. Ct. App. 1994) (holding that covenant limiting use to only "private residential dwellings" precluded the defendant's operation of a bed and breakfast on her property), *overruled on other grounds by Buffington v. T.O.E. Enters.*, No. 26685, 2009 WL 2005147 (S.C. July 13, 2009). In a Florida case involving language similar to that at issue here, the court ruled that short term rentals were nonetheless prohibited. In *Robins v. Walter*, the court construed a "residential use only" covenant as prohibiting the operation of a bed and breakfast on the property. 670 So. 2d 971, 974-75 (Fla. Dist. Ct. App. 1995) ("[T]he obvious intent of the deed restrictions is to allow parties to lease or rent their premises for residential purposes, but not to allow an ongoing commercial enterprise to take place on lots which are designated for noncommercial use."). Similar to Ms. Brown, the defendant in *Robins* relied on a covenant that expressly contemplated rentals and argued that her short term rentals were not prohibited. *Id.* That covenant provided that "'the renting of premises in whole or in part shall not be construed to be a business or commercial operation." *Id.* Rejecting her argument, the

court held that "[t]he rental of a residence in the context of the deed restriction in the instant case and under common understanding involves the rental as a residence rather than just a facility serving temporary or transient guests from the general public." *Id.*

Ms. Brown also claims that the trial court improperly considered the Summit County business ordinance at the summary judgment hearing. She contends that the trial court erred because this "evidence" was not introduced until the hearing and thus she was deprived of an opportunity to respond to it. She further argues that this Court cannot consider the ordinance because it was not read into the record.

Ms. Brown's attempt to avoid the ordinance's impact, however, fails. Ms. Brown "is charged with knowledge of the . . . [o]rdinance, a public statute." *Arnell v. Salt Lake County Bd. of Adjustment*, 2005 UT App 165, ¶ 46, 112 P.3d 1214 (stating "that '[p]urchasers of land must take notice of public statutes restricting the use of the granted premises.'" (quoting *Flemetis v McArthur*, 226 P.2d 124 (Utah 1951))). Further, the Court is free to take judicial notice of the ordinance. *See Wessel v. Erickson Landscaping Co.*, 711 P.2d 250, 253-54 (Utah 1985) (taking judicial notice of Uniform Building Code requirements adopted by Salt Lake City). The trial court properly took notice of the ordinance. Additionally, Ms. Brown had actual notice of the county ordinances, citing them as a basis for her "House Rules." (*See* R.at 46, Exhibit H ("Zoning ordinances prohibit parking on the street.").) The local ordinances were not a surprise to her.[2]

[2] Even if the ordinance is evidence, Ms. Brown had the opportunity to conduct discovery and present her own evidence--she simply chose not to do so. Nor did she file a motion under Rule 56(f) of the Utah Rules of Civil Procedure.

Ms. Brown is bound by the ordinance as a Summit County property owner and by the CC&Rs. (*See* Exhibit E to App.'s Br. at 15, Art. X, § 1 ("properties shall never be occupied or used by or for any building or purpose or in any manner which is contrary to the planning and zoning ordinances and regulations applicable thereto.").) For Summit County business licensing purposes, the ordinance defines "nightly lodging facility" to mean any place, including a single family residence, that is rented "for transient lodging purposes for a period less than thirty (30) days."[3] The ordinance draws a meaningful distinction between a customer/renter and a resident--between a business and residential use.

The residential requirement in the CC&Rs demonstrates the context for understanding the meaning of the prohibition on "timeshare[s], nightly rental[s] or similar use[s]." The CC&Rs were enacted to ensure a residential neighborhood appropriate to family living. Ms. Brown, who lives in California, however, uses her South Ridge home as an income property, and advertised the property for rent. She recognized the distinction drawn by the CC&Rs between her use and an appropriate use, explaining to her renters that the neighbors "are long-term, full-time residents." (Addendum Exhibit A.) She knew she was violating the CC&Rs and asked her renters not to reveal her violations to members of the subdivision. (*Id.*) The distinction drawn by the ordinance between a transient, short term renter and a resident makes sense. Moreover this

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[3] A copy of the ordinance provided at the hearing is attached to the Addendum as Exhibit B. A copy of an earlier version of the ordinance, with the same definition of "nightly lodging facility," that was in effect prior to the execution of the CC&Rs is included in Exhibit B.

distinction is entirely consistent with the language of the CC&Rs which prohibit short term rentals as business, not residential, purposes. There is no meaningful distinction between a renter of two, four, or seven nights and Ms. Brown's attempts to read the words in isolation must fail.

Ms. Brown has failed to establish that the trial court erred. Read as a whole, without ignoring any of its terms, the CC&Rs unambiguously prohibit short term rentals. The undisputed facts demonstrate that Ms. Brown violated the CC&Rs. Therefore, the grant of South Ridge's motion for summary judgment should be affirmed.

II. THE COURT SHOULD AFFIRM THE GRANT OF INJUNCTIVE RELIEF

A. South Ridge is Entitled to Injunctive Relief and Otherwise Demonstrated Harm

Ms. Brown's objection to the trial court's granting injunctive relief must be denied. As a matter of course, South Ridge was entitled to injunctive relief. "The mere breach [of a restrictive covenant] is sufficient ground for interference by injunction." 20 Am. Jur. 2d *Covenants, Conditions and Restrictions* § 265. *See also Houck v. Rivers*, 450 S.E.2d 106, 109 (S.C. Ct. App. 1994) (citing 4 Spencer W. Simons, *Pomeroy's Equity Jurisprudence* § 1342 ("Restrictive covenants . . . will be specifically enforced in equity by means of an injunction as a matter of course upon a breach of the covenant") and citing 5 Richard R. Powell, *Powell on Real Property* § 676 ("The mere breach alone is grounds for injunctive relief.")), *overruled on other grounds by Buffington v. T.O.E. Enters.*, No. 26685, 2009 WL 2005147 (S.C. July 13, 2009).

Utah law is in accordance. "[P]roperty owners who have purchased land in a subdivision, subject to a recorded set of restrictive covenants and conditions, have the right to enforce such restrictions through equitable relief against property owners who do not comply with the stated restrictions." *Fink v. Miller*, 896 P.2d 649, 652 (Utah Ct. App. 1995). Continuing harm is an element of the irreparable injury that justifies an injunction. *Carrier v. Lindquist*, 2001 UT 105, ¶ 26, 37 P.3d 1112. The harm element "is not essential the court's decision to grant a permanent injunction to enforce a restrictive covenant. Property owners have a protectable interest in enforcing restrictive covenants through injunctive relief without a showing of harm." *Fink*, 896 P.2d at 655 n.8. The trial court was authorized to issue the injunction as a result of Ms. Brown's breach of the CC&Rs and correctly exercised its discretion in so doing.

Even then, the threat of continuing harm was present in this case. The trial court altered the form of the injunction because Ms. Brown misunderstood the "threatens to continue violating the CC&Rs" language to mean that she had expressly stated an intent not to abide by the trial court's determination--such was the basis of her objection to South Ridge's proposed order. (*See* R. at 111.) The trial court determined that the threat of continuing and irreparable harm was present and that South Ridge was entitled to injunctive relief. It simply appeased Ms. Brown by striking out the language to reflect that she "has no such intention," (R. at 111), but held that South Ridge was "nevertheless entitled to the injunctive relief prayed for in its complaint," (*id.*).

"While injunctive relief may not be proper when all past abuses have been remedied, courts have held that such relief may be granted where past practices have been stopped in anticipation of suit, and may be resumed if there is no injunction to prevent it." *Estes v. Rowland*, 17 Cal. Rptr. 2d 901, 910 (Cal. Ct. App. 1993). Courts must "'beware of efforts to defeat injunctive relief by protestations of repentance and reform, especially when abandonment seems timed to anticipate suit, and there is a probability of resumption [of the abuses].'" *Id.* (quoting *Fisher v. Koehler*, 692 F. Supp. 1519, 1565 (S.D.N.Y. 1988)). Additionally, the *Estes* court also explained that the United States Supreme Court has "noted that in order to avoid the injunction the burden was on *the defendant* to show the problem 'could not reasonably be expected to recur.'" *Id.* (quoting *U.S. v. Phosphate Export Ass'n*, 393 U.S. 199, 203 (1968)).

Nothing in the record shows that Ms. Brown will stop renting her subdivision home again in violation of the CC&Rs, despite her protestations of repentance. In fact, Ms. Brown's actions belie her argument. She has already disobeyed the trial court's order. Although Ms. Brown did not expressly state her intent to continue violating the CC&Rs, the trial court properly determined, based on the undisputed facts before it, that Ms. Brown's violations would irreparably harm South Ridge, thus warranting injunctive relief. Additionally, South Ridge has a right to enforce the CC&Rs by injunction. The trial court's exercise of its ample discretion was sound.

B. The Scope of the Injunction Properly Protects Each Party's Rights

Nor is the scope of the injunction overbroad, as claimed by Ms. Brown. Relying only her conclusory opinion, Ms. Brown claims the requirement that she provide names of friends or family staying at her home and the dates they will be there, "egregiously" prohibits her from inviting others to her home. The injunction, however, does not amount to a prohibition of Ms. Brown's right to have friends and family visit her subdivision home. In fact, it specifically allows Ms. Brown to invite friends or family to visit.

The cases cited by Ms. Brown are illustrative. In *Winters v. Turner*, the court reversed a grant of injunctive relief because it was essentially impossible for the defendant to exercise his right to the public land and also comply with the injunction. 278 P. 816, 822 (Utah 1929). The plaintiff's land was so intertwined with public land that livestock allowed to graze on the public land could not but help trespass on the plaintiff's land. *Id.* at 818. The injunction was improper because the plaintiff had an adequate remedy at law and because the defendant had to choose between enjoying the public land or complying with the injunction. *Id.* at 822. Ms. Brown faces no such choice. She can easily comply with the injunction and enjoy her right to have friends and family stay at her South Ridge home. South Ridge does not have an adequate remedy at law and nothing in the Record suggests that Ms. Brown's ability to invite certain guests to her home has been egregiously infringed.

In *Envirotech Corp. v. Callahan*, this Court upheld the trial court's denial of the plaintiff's request for an additional injunction because the plaintiff had already received "considerable injunctive relief." 872 P.2d 487, 500 (Utah Ct. App. 1994). The injunctive relief already granted by the trial court removed any competitive advantage enjoyed by the defendant and adequately protected the plaintiff from any unfair competition. *Id.* Here, South Ridge has received no other relief, injunctive or otherwise, that would enable it to ensure Ms. Brown stops renting her South Ridge home. The trial court's order properly balances Ms. Brown's right with the Association's right and ability to enforce the CC&Rs. *See Fink v. Miller*, 896 P.2d 649, 652 (Utah Ct. App. 1995).

Again, Ms. Brown's refusal to obey the trial court's order demonstrates that the current form of the injunction is necessary. Ms. Brown recently had several different groups at her house--all appeared to be renters. (R. at 132-38 and Exhibit A thereto.) Removing the requirement that Ms. Brown provide notice of visits by her friends and family will strip South Ridge of the ability to determine whether the CC&Rs have been violated, essentially rendering the injunction useless. South Ridge would be forced to continually seek the trial court's assistance in enforcing the CC&Rs. The injunction issued by the trial court fairly balances the rights of the parties and reduces the potential of additional, and unnecessary, litigation.

III. SOUTH RIDGE IS ENTITLED TO ATTORNEY FEES

Ms. Brown's final argument is that the trial court's award of attorney fees and costs to South Ridge should be reversed. Of course, her argument is premised on the

incorrect assumption that the trial court erred by granting South Ridge's Motion for Summary Judgment. South Ridge is authorized to enforce the terms of the CC&Rs "by any proceeding at law or in equity, including injunctive proceedings." (Exhibit E to App.'s Br. at 21, Article XI, § 1.) "Costs of such enforcement, including reasonable attorney's fees, shall be borne by the party(ies) in violation." (*Id.*) Because the trial court properly granted summary judgment in favor of South Ridge, the trial court's award of attorney fees was also proper. Accordingly, this Court should affirm the judgment for attorney fees entered by the trial court.

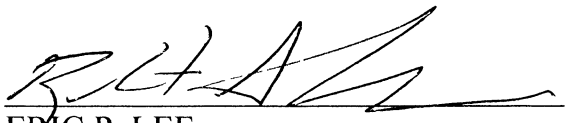
In addition, if the Court affirms the trial court, South Ridge requests attorney fees incurred on appeal. "A party seeking to recover attorney's fees incurred on appeal shall state the request explicitly and set forth the legal basis for such an award." Utah R. App. P. 24(a)(9). South Ridge is entitled to attorney fees on appeal under Article XI, section 1 of the CC&Rs. (Exhibit E to App.s Br. at 21.) *See also Mgmt. Servs. Corp. v. Dev. Assocs.*, 617 P.2d 406, 409 (Utah 1980) (holding that a "provision for payment of attorney's fees in a contract includes attorney's fees incurred by the prevailing party on appeal as well as at trial"). South Ridge also requests costs incurred on appeal, if this Court affirms, pursuant to Rule 34 of the Utah Rules of Appellate Procedure.

CONCLUSION

For the foregoing reasons, South Ridge requests that the judgment of the trial court be affirmed and that it be awarded its attorney fees incurred on appeal.

Dated this 24th day of August 2009

CLYDE SNOW & SESSIONS

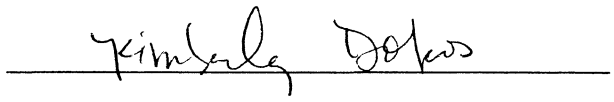


ERIC P. LEE
ROBERT D. ANDREASEN
Attorneys for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that I caused two true and correct copies of the foregoing Brief of Appellee South Ridge Homeowners' Association to be hand-delivered to the following this 24th day of August 2009:

James E. Magleby
Christine T. Greenwood
MAGLEBY & GREENWOOD
170 South Main Street, Suite 350
Salt Lake City, Utah 84101
Attorneys for Defendant-Appellant



ADDENDUM

A. Appellant's "House Rules"

B. Summit County Utah Ordinance 191-A (June 23, 1997) & 191 (April 16, 1991)

Tab A

HOUSE RULES

PRIVILEGES:

Feel free to move furniture around as you want. Just be careful to not scratch the floors, and return everything to its original place before you leave.

Feel free to use any and all spices and baking goods in the pantry. If you find anything needs to be replaced, please add it to my shopping list on the refrigerator.

All drawers and their contents can be used, with the exception of the contents of the labeled drawers in the master and kids' bedrooms upstairs.

If you need to borrow socks, hats, gloves, a fleece pullover, etc., you're welcome to do so. Just remember to return it to its original location.

There are a couple of small plastic sleds in the garage. Kids are welcome to use them.

You are welcome to drink the wine in the house, so long as you pay for it. The most expensive bottles are $65; the least expensive are $11. There is a price list under the wine opener on the wine rack. Please send me a check to pay for what you open (P.O. Box 983008, Park City, UT 84098).

Housecleaning is on Tuesdays - usually in the morning. If that will be a problem for you, let me know, and I will make alternate arrangements.

RESPONSIBILITIES:

The neighbors around here are all very nice, helpful and friendly. They are long-term, full-time residents. They may stop by looking for me. If they do, tell them that "Lisa's not here right now" and be polite. You may tell them that you are my guests, friends, etc., but do not disclose that you are renting the home, as that will make them unhappy, and they will try to make me unhappy.

Be respectful of the neighbors' rights to enjoy QUIET privacy, and do not enter onto their property. The vacant hill across from my house is privately owned. DO NOT use it for sledding or any other purpose - stay off of it.

If you are outside after 10 pm, be QUIET - the neighbors should not be able to hear your laughter, conversation or music.

As a courtesy to the neighbors, turn the lights off on the back patios by 10 p.m.

Garbage pickup is on Monday (usually early a.m.). Please empty the trash from the house into the blue bin in the garage and leave it at the edge of the driveway/street on Sunday night.

At the end of your stay, leave any unwashed towels and bedding in the laundry room.

HOUSE RULES

The neighbors are all very nice, helpful and friendly. They are long-term, full-time residents. Sherrie and Tom are the neighbors across the street, and it would not be unusual for Sherrie to stop by "looking for Lisa." If anyone stops by, tell them that "Lisa's not here right now" and be polite. Tell them only that you are my guests or friends.

Be respectful of the neighbors' rights to enjoy QUIET privacy, and do not enter onto their property. The vacant hill across from my house is privately owned. DO NOT use it for sledding or any other purpose - stay off of it. Do not drive recreational vehicles up and down the streets – that activity needs to be conducted outside the residential area, if at all.

If you are outside after 10 pm, be QUIET -- especially in the hot tub -- the neighbors should not be able to hear your laughter, conversation or music.

As a courtesy to the neighbors, turn the lights off on the back patios by 10 p.m.

Garbage pickup is on Monday (usually early a.m.). Please empty the trash from the house into the blue bin in the garage or driveway, and leave the bin at the edge of the driveway/street on Sunday night.

At the end of your stay, leave any unwashed towels and bedding in the laundry room.

Do not use oils in the hot tub or in the bathtub in the master bathroom. In the bathtub, you are free to use bubble bath, bath salts, or bath fizzers.

Fifth wheels, RVs, etc. are not allowed in the driveway. This is a rule created by the homeowners' association and strictly enforced.

Zoning ordinances prohibit parking on the street. You will have room for four vehicles in the driveway and garage. Please do not exceed this number.

Tab B

ORDINANCE NO. 191-A

AN ORDINANCE PROVIDING FOR BUSINESS LICENSES AND IMPOSING A REGULATORY FEE TO BE PAID BY PERSONS ENGAGED IN BUSINESS IN SUMMIT COUNTY, STATE OF UTAH

BE IT ORDAINED BY THE BOARD OF COUNTY COMMISSIONERS OF SUMMIT COUNTY, STATE OF UTAH, AS FOLLOWS:

SECTION 1. DEFINITIONS. For the purpose of this Ordinance, the following terms shall be defined as follows:

(1) Bedroom. "Bedroom" means each room in a hotel, motel, lodge, time share project, condominium project, single family residence, or other nightly lodging facility that is intended primarily for the temporary use of transient guests for sleeping purposes.

(2) Business. "Business" means and includes all activities engaged in within the unincorporated limits of Summit County carried on for the purpose of gain or economic profit; provided however, acts of employees rendering service to employers shall not be included in the term "business" unless otherwise specifically prescribed herein.

(3) County. "Summit County" or "County" means the unincorporated area of Summit County, State of Utah.

(4) Employee. "Employee" means the operator owner, or manager of a place of business and any persons employed by such person in the operation of said place of business in any capacity whatsoever. "Employee" also includes any salesman, agent, or independent contractor engaged in the operation of said place of business in any capacity.

(5) Engaging in Business. "Engaging in Business" includes but is not limited to, selling tangible personal property at retail or wholesale, manufacturing goods or property, or rendering personal services for a consideration such as the practice of any profession, trade, craft, business, occupation, or other calling. The rendering of personal services by an employee to an employer under any contract of personal employment shall not be considered as engaging in business.

(6) Hourly Uphill Lift Capacity. "Hourly uphill lift capacity" means the aggregate number of person that can be accommodated per hour by all of the ski lifts in a given ski resort operating at the maximum safe rate of operation.

(7) Hourly User Capacity. "Hourly user capacity" means the maximum number of persons that can be safely and reasonably accommodated per hour by an amusement park, golf course, athletic club, theater, bowling alley, tennis club, racquetball club, swimming pool, and any other recreational sports or entertainment facility.

(8) Mobile Food Vendor. "Mobile food vendor" means any motor vehicle from which consumable, on-site food service is offered.

(9) Monthly Rental Facility - Under Management. "Monthly rental facility under management" means any place where rooms or units are rented or otherwise made available by a manager or management company for residential purposes on a monthly or longer time basis, but not including monthly or longer rental by the owner of the property without management.

(10) Nightly Lodging Facility. "Nightly lodging facility" means any place or portion thereof that is rented or otherwise made available to person for transient lodging purposes for a period less than thirty (30) days including, without limitation, a hotel, motel, lodge, condominium project, single family residence, or time share project.

(11) Person. "Person" shall mean any individual, receiver, assignor, trustee in bankruptcy, trust, estate, firm, co-partnership, joint venture, club, company, joint stock company, business trust, corporation, association, society, or their group of individuals acting as a unit, whether mutual, cooperative, fraternal, nonprofit, or otherwise.

(12) Place of Business. "Place of business" means any location maintained or operated by a licensee within the unincorporated limits of Summit County, Utah, in which business activity is conducted or transacted.

(13) Ski Resort. "Ski Resort" means a ski area which is operated as a distinct and separate enterprise, and which shall be deemed to include, without limitation, the ski runs, ski lifts, and related facilities that are part of the ski area and primarily service the patrons of the ski area. The ski resort includes ski instruction, tours, first aid stations, parking garages, managements and maintenance facilities, and workshops, but does not include food service, ski rentals, or retail sales of goods or merchandise, which are all deemed separate businesses even if owned by a resort operator.

(14) Square Footage. "Square footage" means the aggregate number of square feet of area within a place of business that is used by a licensee in engaging in its business.

(15) Unit. "Unit" means any separately rented portion of a hotel, motel, condominium, apartment building, single family residence, duplex, triplex, or other residential dwelling without limitation.

SECTION 2. REGULATORY FEE IMPOSED. There is hereby levied an annual business license regulatory fee, in accordance with U.C.A. 17-5-222 or successor law, upon the business of every person engaging in business in Summit County unless otherwise in this Ordinance or under State or Federal law specifically exempted. The fee imposed shall be in the amounts described in the attached rate tables which are hereby incorporated as part of this Ordinance. The amount shall be the product achieved by multiplying the unit type by the unit charge. Any business type not listed in the rate tables shall be assessed at the rate and on the same basis as

the business determined by the County Clerk to be most similar to the business to be licensed. If the applicant and the County Clerk are not able to agree on a rate and method of assessment, the application shall be referred to the Board of County Commissioners for license issuance. The rate and method of assessment determined by the Board may be applied on a case by case basis, or, if it appears to be of general application or importance, may take the form of an amendment to the table to cover that license and similar applications in the future.

SECTION 3. UNLAWFUL TO OPERATE WITHOUT LICENSE. It shall be unlawful for any person to engage in business within Summit County without first procuring the licenses and/or permits required by this Ordinance.

SECTION 4. BUSINESS LICENSE ADDITIONAL TO ALL OTHER APPROVALS, LICENSES, AND PERMITS. The general business license required under this Ordinance is in addition to all other approvals, licenses and permits required by other County Ordinances, or State or Federal law. As such, issuance of a business license shall not be deemed a waiver of the County's right to enforce all other provisions of its Ordinances or Development Codes. No person shall engage in business without first procuring the necessary approvals, licenses and permits required by other Summit County Ordinances, or State or Federal Laws, in addition to the license required by this Section.

SECTION 5. DELINQUENT DATE AND PENALTY. All license fees provided for in this Ordinance shall be paid annually in advance, by the licensee to the County Clerk on or before January 1st of each year, and shall be effective through December 31st of that year. In the event renewal fees are not received at the office of the County Clerk prior to February 15th of each year when due, the licensee must formally reapply for a business license and pay a penalty of twenty-five percent (25%) of the fees due as part of the reissuance fee.

SECTION 6. CIVIL ACTION TO RECOVER FEE. In all cases where this Ordinance requires a license to be obtained and fixes the amount to be paid therefore, and where said amount shall not have been paid at the time or in the manner provided in this Ordinance, a civil action may be brought in the name of the County against the person failing to pay such license fee to recover the same, including any penalties, and/or to enjoin further business operation of such person. In any case where several amounts for licenses or permits required or fixed by any County Ordinance shall remain due and unpaid by any person, such several amounts of license fees may be joined as separate causes of action in the same civil complaint. The County Attorney shall prepare, bring, and prosecute all civil actions contemplated by this Section upon written request of the County Commission.

SECTION 7. PUBLIC RECORDS. Records kept by the County such as are, or may be required in this Ordinance, are considered public records under the Utah State Government Records Access Management Act. As such, they are subject to public inspection. The County shall charge a reasonable fee to individuals requesting information on issued business licenses in order to cover reasonable costs associated with research and reproduction of information.

SECTION 8. EXEMPTIONS. No license fee shall be imposed under this Section upon any person engaged in business which is exempt from taxation under the laws of the United States and/or the State of Utah; nor shall any such fee be imposed upon any person doing business within Summit County who has paid a like or similar license fee to some other governmental unit within the State of Utah, nor shall any such fee be imposed upon the business of a bona fide farm or ranch engaged in raising plants and/or animals useful to man unless said business is authorized to collect state sales taxes under Utah statute for sales made on such products.

SECTION 9. BRANCH ESTABLISHMENTS. A separate license must be obtained for each branch establishment or location of business within the County as if such branch establishments or locations were separate business and each license shall authorize the licensee to engage only in the business licensed thereby at the location or in the manner designated in such license; however, warehouses and distributing places used in connection with or incident to a business licensed under this Ordinance shall not be deemed to be separate places of business or branch establishments.

SECTION 10. NO TEMPORARY LICENSES. Any person engaging in business on a temporary basis within Summit County shall be required to obtain the license required by this Ordinance in the same manner and shall be subject to the same fees as a person engaging in business on a permanent basis within Summit County. This section shall in no wise alter the requirements under the Development Codes to acquire a minor permit for temporary uses prior to engaging in said business.

SECTION 11. LICENSE APPLICATION. Applications for business licenses shall be made to the County Clerk on forms provided for that purpose. Such forms shall contain sufficient information so as to satisfy the requirements of county departments involved in the review process and such information as the County Commission may direct. Application forms shall be made available at the Office of the County Clerk during regular business hours or by mail. Each license application shall be accompanied by the regulatory license fee required to be paid for the issuance of the license desired. Upon receipt of the completed application and the required fee, the Office of the County Clerk shall review such for compliance with this Ordinance. Should the application be deemed incomplete or the required fee not be included, said application will be returned to the applicant with an explanation as to its deficiencies. Once an application is found to be complete, the County Clerk shall submit such to other county departments for review. These departments shall include, but shall not be limited to Health, Planning and Zoning, Assessor, and Sheriff. If, after review, the departments find the application form acceptable, it shall be returned to the County Clerk bearing the signature of the reviewing official. Should any one or more of these departments find sufficient evidence from the application that a license should not be issued, an explanation for the recommended denial will be attached to the form and it will be returned to the County Clerk. The County Clerk shall provide the applicant with a copy of the explanation for denial. Signature of a department official shall not substitute for additional approvals, licenses, and permits (i.e., conditional use permit or minor permit) required by County Ordinance or, State or Federal law, nor shall it be construed as a waiver of such requirements.

SECTION 12. LICENSE ISSUANCE OR DENIAL. Within fourteen (14) days of receipt of a completed application form, the Clerk shall either (1) issue the license as applied for or (2) provide the applicant with the reason for denial. A license may be denied if the applicant:

1. has been convicted of a fraud or felony by any State of Federal court within the past five (5) years or now has criminal proceedings pending against him/her in any State or Federal court for fraud or a felony;

2. has obtained a license by fraud or deceit;

3. has failed to pay personal property taxes or other required taxes or fees imposed by the County; or

4. has violated the laws of the State of Utah, the United States, or the Ordinances of Summit County governing the operation of the business for which the applicant is applying for the license.

SECTION 13. APPEALS OF LICENSE DENIAL. Any denial for a business license may be appealed to the Board of County Commissioners within fourteen (14) days of notification of such denial. All appeals must be made in writing and the Board of County Commissioners will schedule a hearing on such within thirty (30) days of receipt of the appeal.

SECTION 14. LICENSE PERIOD. Licenses issued shall be valid for one year from date of issuance unless revoked pursuant to this Ordinance.

SECTION 15. POSTING LICENSE. It shall be the duty of any person licensed under this Ordinance to keep such license posted in a prominent place on the premises used for such business at all times. Every licensee not having a fixed place of business shall carry such license with him/her at all times while carrying on the business for which the license is issued.

SECTION 16. LICENSE TO BE SHOWN TO OFFICIALS. It shall be the duty of each and every person to whom a license has been issued to show the same at any proper time when requested to do so by any Sheriff, or other law enforcement office or county official.

SECTION 17. TRANSFERABILITY OF LICENSES. No license granted or issued under the provisions of this Ordinance may be assigned, transferred, or sold by the licensee nor may the license be used for any purpose or business other than that for which said license was issued. Furthermore, a business license issued for a particular location may not be transferred for use to another location. Any county business license transferred or used as described in this section is deemed revoked.

SECTION 18. REVOCATION. Any license issued under this Ordinance may be revoked by the Board of County Commissioners when it finds that the licensee has:

1. filed a false or fraudulent license application;

2. been convicted or plead guilty to, or paid fines or settlements in criminal or civil actions by the State Tax Commission for the collection of, or arising from the non-payment of taxes imposed by or collected by the State of Utah;

3. used the business for a front for or site of illegal activity;

4. engaged in its business without acquiring the appropriate additional approvals, licenses, and permits required by County Ordinance or, State or Federal law for the operation of said business within the County.

Notification of the license revocation hearing shall be sent by the County Clerk to the licensee at the address provided on the most recent application. Such notice shall be sent by certified mail. The hearing shall be held at least fourteen (14) days from the date of the notice, but not more than thirty (30) days. At the hearing, the Board of County Commissioners may revoke or suspend the license, place it on probation for a period of less than one year, or take no action at all, as the circumstances merit.

SECTION 19. ENFORCEMENT OF OTHER COUNTY ORDINANCES. The grant or denial of a general business license shall in no way bind, waive, or alter the County's ability to enforce any other County Ordinances where there is a violation of such. Estoppel shall not be a defense to such actions by the County when it is engaged in the process of enforcing compliance with its laws, regulations, ordinances, and development codes in relation to the operation of any business within the County. This section specifically allows, but is not limited to the County's enforcement of conditional use and minor permit rules, regulations, and laws.

SECTION 20. LICENSE RENEWAL NOTICE. On or before the renewal date each year, the County Clerk shall send a notice to each current licensee within the County which shall state the amount of the regulatory fee to be imposed for the coming year. The notice shall also contain a copy of the previous year's application which the licensee shall review. Any changes in the application information shall be noted on the application form. The notice shall also contain a statement by the licensee that the information provided on the previous application, including any amended information, is correct to the best of the applicant's knowledge, and that all necessary and proper approvals, licenses, and permits for the applicant's business have been acquired. The renewal notice shall be returned to the County Clerk according to the notice directions. Renewal of licenses is not of right, and no claim of a vested right shall inure to an applicant who has received licenses in past years.

SECTION 21. EACH PORTION OF ORDINANCE ENACTED SEPARATELY. If any chapter, section, subsection, sentence, clause, phrase, or portion of this Ordinance, including, but not limited to any exemption, is for any reason held to be invalid or unconstitutional by the decision of any court of competent jurisdiction, such decisions shall not effect the validity of the

remaining portions of this Ordinance. The Board of Commissioners of Summit County hereby declare that it would have adopted this Ordinance and each chapter, section, subsection, sentence, clause, phrase portion thereof, irrespective of the fact that any one or more chapters, sections, subsections, sentences, clauses, phrases, or portions thereof be declared invalid or unconstitutional.

SECTION 22. PENALTY. Any person, firm, or corporation violating any of the provisions of this Ordinance shall be deemed guilty of a separate offense for each and every day or portion thereof, during which any violation of any of the provisions of this Ordinance is committed, continued, or permitted. Upon conviction of any such violation, such person shall be punishable as a Class B Misdemeanor except that in all cases where a corporation would be punishable as for a Misdemeanor, and there is no other punishment prescribed by Ordinance, such corporation is punishable by a fine not exceeding $1,000.00.

SECTION 23. REPEALER. Summit County Ordinance No. 191 is hereby repealed and all other ordinances which are inconsistent with the provisions of this Ordinance are repealed to the extent of that inconsistency.

SECTION 24. EFFECTIVE DATE. This Ordinance shall become effective after subsequent publication in accordance with State law.

APPROVED, ADOPTED AND PASSED and ordered published by the Summit County Board of Commissioners, this 23rd day of June, 1997.

STATE OF UTAH COUNTY CLERK SUMMIT COUNTY

SUMMIT COUNTY BOARD OF COMMISSIONERS

Sheldon D. Richins

SHELDON D. RICHINS, CHAIRMAN

James N. Soter

JAMES N. SOTER

ERIC SCHIFFERLI

ATTEST:

KENT H. JONES
Summit County Clerk

COMMISSIONERS VOTED:

RICHINS Nay (AYE OR NAY)

SOTER Aye (AYE OR NAY)

SCHIFFERLI Aye (AYE OR NAY)

APPROVED AS TO FORM:

DAVID L. THOMAS
Deputy County Attorney

ORDINANCE NO. 191

AN ORDINANCE PROVIDING FOR BUSINESS LICENSES AND IMPOSING A REVENUE TAX TO BE PAID BY PERSONS ENGAGED IN BUSINESS IN SUMMIT COUNTY, STATE OF UTAH

BE IT ORDAINED BY THE BOARD OF COUNTY COMMISSIONERS OF SUMMIT COUNTY, STATE OF UTAH, AS FOLLOWS:

SECTION 1. DEFINITIONS. For the purpose of this ordinance, the following terms shall be defined as follows:

(1) Bedroom. "Bedroom" means each room in a hotel, motel, lodge, timeshare project, condominium project, single family residence or other nightly lodging facility that is intended primarily for the temporary use of transient guests for sleeping purposes.

(2) Business. "Business" means and includes all activities engaged in within the unincorporated limits of Summit County carried on for the purpose of gain or economic profit; provided however, acts of employees rendering service to employers shall not be included in the term "business" unless otherwise specifically prescribed herein.

(3) County. "Summit County" or "County" means the unincorporated area of Summit County, State of Utah.

(4) Employee. "Employee" means the operator, owner or manager of a place of business and any persons employed by such person in the operation of said place of business in any capacity whatsoever. "Employee" also includes any salesman, agent, or independent contractor engaged in the operation of said place of business in any capacity.

(5) Engaging in Business. "Engaging in Business" includes but is not limited to, selling tangible personal property at retail or wholesale, manufacturing goods or property, or rendering personal services for a consideration such as the practice of any profession, trade, craft, business occupation, or other calling. The rendering of personal services by an employee to an employer under any contract of personal employment shall not be considered as engaging in business.

(6) Hourly Uphill Lift Capacity. "Hourly uphill lift capacity" means the aggregate number of persons that can be accommodated per hour by all of the ski lifts in a given ski resort operating at the maximum safe rate of operation.

(7) Hourly User Capacity. "Hourly user capacity" means the maximum number of persons that can be safely and reasonably accommodated per hour by an amusement park, golf course, athletic club, theater, bowling alley, tennis club, racquetball club, swimming pool, and any other recreational, sports or entertainment facility.

(8) Mobile Food Vendor. "Mobile food vendor" means any motor vehicle from which consumable, on-site food service is offered.

(9) Monthly Rental Facility - Under Management. "Monthly rental facility - under management" means any place where rooms or units are rented or otherwise made available by a manager or management company for residential purposes on a monthly or longer time basis, but not including monthly or longer rental by the owner of the property without management.

(10) Nightly Lodging Facility. "Nightly lodging facility" means any place or portion thereof that is rented or otherwise made available to persons for transient lodging purposes for a period less than thirty (30) days including, without limitation, a hotel, motel, lodge, condominium project, single family residence or timeshare project.

(11) Non-profit Corporation. "Non-profit corporation" means a corporation, no part of the income of which is distributable to its members, trustees or officers, or a non-profit cooperative association.

(12) Person. "Person" shall mean any individual, receiver, assignor, trustee in bankruptcy, trust, estate, firm, co-partnership, joint venture, club, company, joint stock company, business trust, corporation, association, society, or their group of individuals acting as a unit, whether mutual, cooperative, fraternal, nonprofit, or otherwise.

(13) Place of Business. "Place of Business" means any location maintained or operated by a licensee within the unincorporated limits of Summit County, Utah, in which business activity is conducted or transacted.

(14) Ski Resort. "Ski resort" means a ski area which is operated as a distinct and separate enterprise, and which shall be deemed to include, without limitation, the ski runs, ski lifts, and related facilities that are part of the ski area and primarily service the patrons of the ski area. The ski resort includes ski instruction, tours, first aid stations, parking garages, management and maintenance facilities, and workshops, but does not include food service, ski rentals, or retail sales of goods or merchandise, which are all deemed separate businesses even if owned by a resort operator.

(15) Square Footage. "Square footage" means the aggregate number of square feet of area within a place of business that is used by a license in engaging in its business.

(16) Unit. "Unit" means any separately rented portion of a hotel, motel, condominium, apartment building, single family residence, duplex, triplex, or other residential dwelling without limitation.

Section 2. Revenue Tax Imposed. There is hereby levied an annual business license revenue tax upon the business of every person engaging in business in Summit County unless otherwise in this Ordinance or under State or Federal law specifically exempted. The rate of tax imposed shall be in the amounts described in the attached rate tables which are hereby incorporated as part of this ordinance. The amount shall be the product achieved by multiplying the unit type by the unit charge. Any business type not listed in the rate tables shall be assessed at the rate and on the same basis as the business determined by the Clerk to be most similar to the business to be licensed. If the applicant and the Clerk are not able to agree on a rate and method of assessment, the application shall be referred to the Board of County Commissioners for license issuance. The rate and method of assessment determined by the Board may be applied on a case by case basis, or, if it appears to be of general application or importance, may take the form of an amendment to the table to cover that license and similar applications in the future.

Section 3. Unlawful to Operate Without License. It shall be unlawful for any person to engage in business within Summit County without first procuring the licenses and/or permits required by this ordinance.

Section 4. License Additional to all other Licenses. The general business license required under this ordinance is in addition to all other licenses and permits required by other ordinance provisions. No person shall engage in business without first procuring the necessary licenses and permits required by other provisions of Summit County ordinances, or State or Federal Laws, in addition to the license required by this section.

Section 5. Delinquent Date and Penalty. All license fees provided for in this ordinance shall be paid annually in advance, by the licensee to the County Clerk on or before January 1st of each year, and shall be effective through December 31st of that year. In the event renewal fees are not received at the office of the County Clerk prior to February 15th of each year when due, the licensee must formally reapply for a business license and pay a penalty of twenty-five percent of the fees due as part of the reissuance fee.

Section 6. Civil Action to Recover Fee. In all cases where this ordinance requires a license to be obtained and fixes the amount to be paid therefore, and where said amount shall not have been paid at the time or in the manner provided in this ordinance, a civil action may be brought in the name of the County against the person failing to pay such license fee to recover the same, including any penalties, and/or to enjoin further business operation of such person. In any case where several amounts for licenses or permits required or fixed by any county ordinance shall remain due and unpaid by any person, such several amounts of license fees may be joined as separate causes of action in the same civil complaint. The County Attorney shall prepare, bring and prosecute all civil actions contemplated by this section upon written request of the County Commission.

Section 7. Records Not Public Record. Records kept by the County such as are, or may be required in this ordinance, shall not be made public nor shall they be subject to the inspection of any person not engaged in official government activity. It shall be unlawful for any person to make public or to inform any other person as to the contents of any information contained in any record or permit the inspection thereof except as authorized in this section.

Section 8. Exemptions. No license fee shall be imposed under this section upon any person engaged in business which is exempt from taxation under the laws of the United States and/or the State of Utah; nor shall any such fee be imposed upon any person doing business within Summit County who has paid a like or similar license tax or fee to some other governmental unit within the State of Utah and which governmental unit exempts from its license tax or fee by written interlocal cooperation agreement, businesses domiciled in Summit County and doing business in such other governmental unit; nor shall any such fee be imposed upon the business of a bona fide farm or ranch engaged in raising plants and/or animals useful to man unless said business is authorized to collect state sales taxes under Utah statute for sales made on such products.

Section 9. Branch Establishments. A separate license must be obtained for each branch establishment or location of business within the County as if such branch establishments or locations were separate businesses and each license shall authorize the licensee to engage only in the business licensed thereby at the location or in the manner designated in such license; however, warehouses and distributing places used in connection with or incident to a business licensed under this ordinance shall not be deemed to be separate places of

business or branch establishments.

Section 10. No Temporary Licenses. Any person engaging in business on a temporary basis within Summit County shall be required to obtain the license required by this ordinance in the same manner and shall be subject to the same fees as a person engaging in business on a permanent basis within Summit County.

Section 11. License Application. Applications for business licenses shall be made to the County Clerk on forms provided for that purpose. Such forms shall contain sufficient information as to satisfy the requirements of county departments involved in the review process and such information as the county Commission may direct. Application forms shall be made available at the Office of the County Clerk during regular business hours or by mail. Each license application shall be accompanied by the revenue license tax required to be paid for the issuance of the license desired. Upon receipt of the completed application and the required fee, the Office of the Clerk shall review such for compliance with this ordinance. Should the application be deemed incomplete or the required fee not be included, said application will be returned to the applicant with an explanation as to why. Once an application is found to be complete, the Clerk shall submit such to other county departments for review. These departments shall include, but not be limited to, Health, Planning and Zoning, Assessor and Sheriff. If, after review, the departments find the application form acceptable, it shall be returned to the County Clerk bearing the signature of the reviewing official. Should any one or more of these departments find sufficient evidence from the application that a license should not be issued, an explanation for the recommended denial will be attached to the form and it will be returned to the County Clerk. The Clerk shall provide the applicant with a copy of the explanation for denial.

Section 12. License Issuance or Denial. Within fourteen (14) days of receipt of a completed application form, the Clerk shall either (1) issue the license as applied for or (2) provide the applicant with the reason for denial. A license may be denied if the applicant:

(1) Has been convicted of a fraud or felony by any state or federal court within the past five (5) years or now has criminal proceedings pending against him/her in any state or federal court for fraud or a felony,

(2) Has obtained a license by fraud or deceit,

(3) Has failed to pay personal property taxes or other required taxes or fees imposed by the County, or

(4) Has violated the laws of the State of Utah, the United States, or the ordinances of Summit County governing the operation of the business for which the applicant is applying for the license.

Section 13. Appeals of License Denial. Any denial for a business license may be appealed to the Board of County Commissioners within fourteen (14) days of notification of such denial. All appeals must be made in writing and the Board of County Commissioners will schedule a hearing on such within thirty (30) days of receipt of the appeal.

Section 14. License Period. Licenses issued shall be valid through December 31st of the year of issuance unless revoked pursuant to this ordinance. Licenses issued between October 1st and December 31st shall be valid through December 31st of the year following issuance provided that such licenses shall be charged a fee of 125% of the amount otherwise imposed pursuant to this ordinance.

Section 15. Posting License. It shall be the duty of any person licensed under this ordinance to keep such license posted in a prominent place on the premises used for such business at all times. Every licensee not having a fixed place of business shall carry such license with him/her at all times while carrying on the business for which the license is issued.

Section 16. License to be Shown to Officials. It shall be the duty of each and every person to whom a license has been issued to show the same at any proper time when requested to do so by any Sheriff, or other law enforcement officer or county official.

Section 17. Transferability of Licenses. No license granted or issued under the provisions of this ordinance may be assigned, transferred, or sold by the licensee nor may the license be used for any purpose or business others than that for which said license was issued. Furthermore, a business license issued for a particular location may not be transferred for use to another location. Any county business license transferred or used as described in this section is deemed revoked.

Section 18. Revocation. Any license issued under the ordinance may be revoked by the Board of County Commissioners when they find that the licensee has:

(1) filed a false or fraudulent license application,

(2) been convicted or plead guilty to, or paid fines or settlements in criminal or civil actions by the State Tax Commission for the collection of, or arising from the non-payment of taxes imposed by or collected by the State of Utah,

(3) used the business for a front for or site of illegal activity,

Notification of the license revocation hearing shall be sent by the County Clerk to the licensee at the address provided on the most recent application. Such notice shall be sent by certified mail. The hearing shall be held at least fourteen (14) days from the date of the notice, but not more than thirty (30) days. At the hearing, the Board of Commissioners may revoke or suspend the license, place it on probation for a period of less than one year, or take no action at all, as the circumstances merit.

Section 19. License Renewal Notice. On or before December 1st of each year, the Clerk shall send a notice to each current licensee within the County which shall state the amount of the revenue tax to imposed for the coming year. The notice shall also contain a copy of the previous year's application which the licensee shall review. Any changes in the application information shall be noted on the application form. The notice shall also contain a statement by the licensee that the information provided on the previous application, including any amended information, is correct to the best of the applicants knowledge. The renewal notice shall be returned to the Clerk prior to December 31st.

Section 20. Each Portion of Ordinance Enacted Separately. If any chapter, section, subsection, sentence, clause, phrase, or portion of this ordinance, including, but not limited to any exemption, is for any reason held to be invalid or unconstitutional by the decision of any Court of competent jurisdiction, such decision shall not effect the validity of the remaining portions of this ordinance. The Board of Commissioners of Summit County hereby declare that it would have adopted this ordinance and each chapter, section, subsection, sentence, clause, phrase portion thereof, irrespective of the fact

that any one or more chapters, sections, subsections, sentences, clauses, phrases, or portions thereof be declared invalid or unconstitutional.

Section 21. Penalty. Any person, firm, or corporation violating any of the provisions of this ordinance shall be deemed guilty of a separate offense for each and every day or portion thereof, during which any violation of any of the provisions of this ordinance is committed, continued, or permitted. Upon conviction of any such violation, such person shall be punishable as a Class B Misdemeanor except that in all cases where a corporation would be punishable as for a Misdemeanor, and there is no other punishment prescribed by ordinance, such corporation is punishable by a fine not exceeding $1,000.00.

Section 22. Repealer. Summit County Ordinance No. 28 is hereby repealed.

Section 23. Effective Date. This ordinance shall become effective 30 days after publication.

PASSED AND ADOPTED and ordered published by the Board of County Commissioners of Summit County, Utah on the 16th day of April, 1991.

BOARD OF SUMMIT COUNTY COMMISSIONERS:

By Sheldon D. Richins
Sheldon D. Richins, Chairman

APPROVED AS TO FORM:

Franklin D. Andersen

STATE OF UTAH THIRD CIRCUIT COURT COALVILLE

R. Geary, County Clerk

Franklin D. Andersen, Deputy County Attorney

Commissioner Richins voted Yea

Commissioner Moser voted Yes

Commissioner Perry voted Yea

Published this 26th day of April, 1991 in the Summit County Bee and this 25th day of April, in the Park Record.